up to our plant on the 12th of October, as you'll find in the notes.

Q. 1954? A. 1954, yes. He showed us a working model of his thermostat.

Q. Can you identify either of those models we've presented to you? A. Yes, the one with the black box on it.

Q. The one with the little black box on it was the one that— A. I'm sure I saw that, and he had some other models with him which I couldn't be sure of at the moment.

Q. Can you determine whether or not the other device there was the other one that Lynn Burch showed you at that time? A. I wouldn't be sure that it was this one, but I'm sure it was different than the one with the black box. He had two or three different pieces with him.

Q. What happened subsequent to the time that Lynn Burch showed you those—what took place at that time? A. At that time he gave us a demonstration of how sensitive this thermostat was. He had a battery and a flashlight bulb with him, and adjusted the adjusting screw so that the thermostat was just on, and, take hold of the tube in your hand and almost like that the light would go out (witness snaps fingers).

Q. That's the one that Lynn Burch showed you on October 12, 1954? A. Yes.

Q. Were you at that time familiar with rod and tube thermostats? A. Oh, yes.

Q. To what extent? What did you know about it then? A. Well, the operating principles. Most of them, however, in order to give satisfactory sensitivity, had to be quite long, whereas this one made by Lynn Burch had a hinge arrangement with a multiplier for multiplying the motion which is produced by the differential expansion of the rod and tube.

Q. Was this the first rod and tube thermostat you had seen with such a motion multiplier in it? A. I don't believe so. I think I have seen motion

multipliers, but once again they were always large by comparison with what is in Burch's thermostat.

Q. Did this thermostat immediately appeal to you as being useful in your fry pan or cooking pan construction? A. Yes, I thought so.

Q. What did you next do? A. Made one like it.

* * * * *

Q. When did you make up this model to test it? A. The next day after Lynn visited us.

Q. That would have been— A. October 13, and I tested it on the 14th.

Q. What was the results of your test? A. Well, the tests were satisfactory enough so that we decided that's what we wanted to use if it were available.

* * * * *

Q. Did you yourself or those working for you or with you at Farber attempt to develop the mechanical details for the thermostat for the plug, or was that developed by Spencer, Burch and— A. We assumed that that was done by Burch. I mean he has it practically right here.

Mr. Mims: You were referring to this thermostat with the black box on it? The Witness: Yes.

Q. The particular construction of the thermostat that is shown in the drawings of the patent in suit, with which you're familiar, the particular construction is the construction developed by Burch or Metals & Controls. Is that right? A. Yes.

Q. So that your contribution to this, if any, was the idea of a detachable plug that would have a temperature-sensing unit in it and would have a probe that would stick in the cavity under the skillet. Is that right? A. That's right.

Q. Then you went to them to get a thermostat that would do the job? A. That's right.

Q. The details that we find in there, such as a bracket within the housing, which are included in some of the claims of the patent application, that

bracket was put in the device which you started making a broadboard model of—that bracket was put in by the people at M&C. Is that right? A. That's right.

Q. The fact that the electrical contact members were affixed to that bracket as they are in the patent drawings, this was a contribution from the Burch and M&C people. Is that right? A. That's right.

Q. The idea of the stacked relationship of the contacts that appears in the present device and in the drawings of the patent, that feature was contributed from Burch and the M&C group. Is that right? A. Yes.

Q. In other words, you didn't attempt to contribute that sort of thing? A. No.

Q. The motion multiplier feature, the mechanical motion multiplier feature of the thermostat, again was contributed by Burch. Is that right? A. Oh, yes, that's part of this thermostat here.

Q. In other words, he showed you that; you didn't show him that? A. No.

* * * * *

Q. Have we reached the conclusion in the discussion of your first patent application and the patent application that eventually resulted in the patent in suit that you had, at some time prior to the time you met Lynn Burch, had gotten the idea for a probe type thermostat under a fry pan—A. Definitely.

Q. (continuing)—and that when you met Lynn Burch was the time that you got the information about a rod and tube type thermostat, and the development of that came from M&C and this you then incorporated into your original idea? A. That's right.

Q. So that your contribution goes back to the original idea of a probe type thermostat under a fry pan, or under a cooking pan? A. That's right.

Q. The details are somebody else's? A. Yes.

* * * * *

As a further matter, the findings listed on pages 6 and 7 of the petition and attributed to the District Court are, first, an incomplete list of the findings made and, second, are worded to reflect the desires of Petitioner as to originality, novelty, success, etc., rather than being given the meaning and context intended by the District Court. Thus, to discern the actual findings of the District Court, it will be necessary to refer to the District Court's opinion on the cited pages following each of Petitioner's purported "finding of fact".

REASONS FOR DENIAL OF PETITION

As will be apparent from the two decisions of the District Court, the Court had before it a considerable number of reference patents and prior rod and tube thermostat constructions. Further, the testimony of the inventor, experts both for the Plaintiff and the Defendant and a number of fact witnesses was before the Court. From this, the Court reached the factual conclusion that "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains."

The Third Circuit Court of Appeals affirmed this decision per curiam in a three paragraph decision.

Petitioner is simply asking this Court to re-try a very thoroughly tried case and change the findings of fact of the District Court under the guise of setting a different "standard of patentability to be applied under Section 103."

In *Graver Tank Co.* v. *Linde Air Products Co.*, 339 U.S. 605, 611-612 (1949), this Court made its position

clear that it will not essay an independent review of the evidence.

The trial court made a number of findings of fact including the ultimate fact of obviousness. The Petitioner here has made no effort in either the Court of Appeals or this Court to show that the findings of the trial court were "clearly erroneous." F.R.C.P. 52(a).

The Petitioner has cited four cases (October 1965 Term) in which petitions for writ of certiorari were granted by this Court and has attempted to align itself with the obviousness and standard of patentability questions present in such cases. A close examination of these cases reveals that there were factors present which are not found in this Petitioner's Petition. In Number 11, *William T. Graham et al.* v. *John Deere Company of Kansas City et al.*, there is an actual conflict in decisions as to the same patent between the Fifth Circuit Court of Appeals and the Eighth Circuit Court of Appeals. Furthermore, the Eighth Circuit Court of Appeals' decision represents a reversal of the District Court decision holding the patent in suit valid and infringed. On the question of obviousness, the petition contends that the Eighth Circuit Court of Appeals applied too strict a standard of patentability.

Case Number 37, *Calmar, Inc.* v. *Cook Chemical Co.*, and Case No. 43, *Colgate-Palmolive Co.* v. *Cook Chemical Co.*, represent only a single petition before this Court and is a petition from a decision of the same Eighth Circuit Court of Appeals. In this instance, the petition is from a holding that the patent in suit was valid and infringed and, contra to Case Number 11, the petition on the proper standard of patentability contends that this Court should correct the "drift to lax standards" of Eighth Circuit Court of Appeals.

In Case Number 55, *United States* v. *Adams et al.*, the petition is from a decision of the Court of Claims holding the patent valid and infringed. Again as in Number 37 and 43, the petition to this Court is to correct a "debasement" in the standard of patentability applicable to patents.

The circumstances present in the cases for which petitions for Writ of Certiorari were granted are not present here. There is no conflict in decisions between Courts. There is no holding of validity of the patent involved but rather only holdings by both the District Court and the Court of Appeals that the patent is invalid after full hearings on the question of obviousness and the applicable standard of patentability. Above all, even though the petition were to be granted, any standard of patentability adopted by this Court, high or low, would merely result in the same holding of invalidity that has already prevailed twice before in view of the obvious appropriation and adoption by the alleged inventor of the work of others.

Respondent respectfully contends that, for the reasons given, the petition for a writ of certiorari should be denied.

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